**UNITED STATES BANKRUPTCY COURT**
**SOUTHERN DISTRICT OF OHIO**
**EASTERN DIVISION**

| | | |
|---|---|---|
| In re: | : | |
| LORI GIVENS | : | CASE NO.: 12-52662 |
| Debtor. | : | Chapter 13 |
| | : | Judge Charles M. Caldwell |

---

# FEDERAL NATIONAL MORTGAGE ASSOCIATION AND SETERUS, INC.'S POST-TRIAL BRIEF

Pursuant to the Court's Scheduling Order Directing the Submission of Post-Trial Briefs (Docket No. 158), Federal National Mortgage Association ("FNMA") and Seterus, Inc. ("Seterus") submit the following:

## A. The evidence at trial demonstrated that Seterus' actions resulted from a mistake, not a willful violation of the discharge injunction, and the mistake was corrected before Ms. Givens even filed a motion for contempt.

As regards whether or not a violation of the discharge injunction occurred, the evidence at trial established the following:

1. On January 13, 2016, the Chapter 13 Trustee filed a motion to deem Ms. Givens' mortgage current through December 2015 as well as a notice of final cure payment (collectively, the "Deemed Current Motion"). Debtor's Trial Exs. 17 and 18.

2. In responding to the Deemed Current Motion, there was a miscommunication between Seterus and its prior counsel; specifically, Seterus provided its prior counsel information regarding Ms. Givens' escrow account deficiency in the amount of $2,196.20 for purposes of responding to the Deemed Current Motion, but the response as actually filed by Seterus' prior counsel on February 2, 2016 omitted any reference to the escrow deficiency. Ex. 1, Hrg. Tr. pp. 148:1-149:19; Debtor's Trial Ex. 19.

3. On February 4, 2016, Ms. Givens received her discharge. Debtor's Tr. Ex. 20.

4. On February 12, 2016, the Court entered its Order Granting Trustee's Motion to Deem Mortgage Current (the "Deemed Current Order"). Debtor's Trial Ex. 22.

5. On April 15, 2016, Seterus credited $375.00 to Ms. Givens' account in order to comply with the Deemed Current Order. Specifically, the credits were made to offset all property inspection fees on her pre-dating the Deemed Current Order. Ex. 1, Hrg. Tr. pp. 102:7-103:18, 134:17-135:4.

6. On May 31, 2016, the Chapter 13 Trustee sent a letter to Seterus stating in relevant part, "It has come to our attention that Federal National Mortgage Association has not updated their records pursuant to the Order Deeming Mortgage Current (Docket #116). Enclosed please find a copy of the Motion and the Order to assist in the updating of your records." Debtor's Trial Ex. 34.

7. Upon receipt of the above-referenced letter in early June 2016, Seterus realized that there had been a miscommunication with its prior counsel regarding the response to the Deemed Current Motion, which in turn led to the discrepancy between its records and Ms. Givens' records for the amount of the escrow shortage. Ex. 1, Hrg. Tr. pp. 107:15-108:3.

8. Through June and July 2016, Seterus employees worked to obtain internal approval for, and process, numerous adjustments to Ms. Givens' account in order to reverse the escrow shortage, not only to fully comply with the Deemed Current Order but to bring Ms. Givens' account current through August 1, 2016. Ex. 1, Hrg. Tr. pp. 107:15-113:11; 149:20-157:11. Within one week of receiving the Chapter 13 Trustee's letter, Seterus began corrective actions. Ex. 1, Hrg. Tr. pp. 136:9-137:2. Seterus spent over $3,000.00 in hard costs to bring Ms. Givens' account current as of August 1, 2016. Ex. 1, Hrg. Tr. pp. 137:3-138:8; 153:18-158:2.

9. Seterus' computer system generated a total of two loan default notices to Ms. Givens as a result of Seterus' mistake regarding the Deemed Current Order – one dated June 1, 2016 and a second one dated June 14, 2016. Ex. 1, Hrg. Tr. pp. 32:12-21, 33:15-25; Debtor's Trial Exs. 35 and 36. These notices were generated while Seterus was still working to fix the mistake. Ex. 1, Hrg. Tr. pp. 111:5-113:11, 157:7-11. However, Seterus never acted on these notices (*i.e.*, Ms. Givens did not present any evidence that Seterus ever actually accelerated her loan or commenced any foreclosure proceeding against her). To the contrary, Ms. Givens testified that Seterus never commenced a foreclosure proceeding against her. Ex. 1, Hrg. Tr. p. 58:8-15.

10. On July 12, 2016, Ms. Givens filed a motion to reopen her case. (Docket No. 121).

11. By July 28, 2016, Ms. Givens' account was brought completely current through August 1, 2016. Ex. 1, Hrg. Tr. p. 155:9-21.

12. The Court reopened Ms. Givens' case on August 9, 2016, although her account was corrected and current at that time. (Docket No. 122).

13. On September 13, 2016, Ms. Givens filed a motion to have Seterus and FNMA held in contempt for having violated the Deemed Current Order, and she claimed that the violations were ongoing. (Docket No. 128). However, Ms. Givens proffered no evidence at trial to contradict Seterus's witness testimony and business records demonstrating that her account had been brought completely current by July 28, 2016 and that there were no ongoing violations past that date.

14. During the course of this litigation, Ms. Givens repeatedly missed monthly mortgage payments, and late-paid many payments, which resulted in accrual of more than $100

of additional fees and charges to her account after August 1, 2016. Ex. 1, Hrg. Tr. pp. 41:3-4, 42:2-43:18, 61:3-15. However, Seterus wrote off all such fees and charges in a good faith effort to assist in keeping Ms. Givens' account current and to resolve this litigation with Ms. Givens. Ex. 1, pp. 138:9-139:9, 157:25-161:17.

15. On June 12, 2017, Ms. Givens filed a separate complaint against Seterus in the District Court arising out of the same set of facts that gave rise to her contempt motion, pursuing tort claims and other legal theories. Seterus' Trial Ex. C. The District Court case is still pending. In the District Court case, Ms. Givens alleges "actual damages" of $1,888.54. Ex. 1, Hrg. Tr. p. 172:10-14. Ms. Givens is also seeking additional damages of at least $30,000.00 for "emotional distress damages", "punitive damages" and "treble damages", and she has demanded a jury trial on her claims. Ex. 1, Hrg. Tr. pp. 172:15-173:11.

Based on the foregoing evidence, Seterus admits that it violated the discharge injunction in the strictest sense; namely, Seterus received notice of the Deemed Current Order sometime in February 2016 but did not fully comply with the Deemed Current Order until July 28, 2016. At the same time, the evidence at trial also established that Seterus' actions resulted from a mistake and were not willful, that Ms. Givens' account was already corrected to comply with the Deemed Current Order before Ms. Givens even filed her contempt motion, and that Ms. Givens suffered little or no economic harm.

Based on the evidence at trial, Seterus maintains that there is an insufficient basis to impose any punitive damages against Seterus, and that Ms. Givens' actual damages should be limited to attorney fees reasonably expended by her counsel on her behalf prior to July 28, 2016, when Ms. Givens' account was brought current as of August 1, 2016. Any attorney fees expended after that date were expended merely in the hopes of obtaining a substantial windfall from Seterus, either in the form of a large cash settlement or a substantial write-off of Ms. Givens' remaining mortgage balance. Such fees were not expended to obtain compliance with the Deemed Current Order. As aptly stated by one bankruptcy court:

> [C]ourts especially scrutinize cases where the debtor's only injuries are those incurred in litigating the motion for sanctions, and where there exist no circumstances warranting punitive damages…. [W]hether it is the automatic stay… or the discharge injunction, it is inherently improper for a debtor or their attorney to view violations thereof as a profit-making endeavor.

*In re Duling*, 360 B.R. 643, 646-647 (Bankr. N.D. Ohio 2006).

As an additional basis for limiting damages, the evidence at trial established that Seterus spent more than $3,000.00 between April 2016 and July 2016 in order to bring itself into compliance with the Deemed Current Order, exclusive of the substantial attorney fees and costs Seterus has incurred in defending this litigation and the additional late fees and other account charges Seterus has waived for Ms. Givens' benefit during the past year, despite Ms. Givens' failure to timely make all of her mortgage payments during that timeframe.

**B. The Court should not award Ms. Givens any emotional distress damages.**

**1. The Court should follow those cases holding that emotional distress damages are not recoverable in a civil contempt proceeding.**

The Sixth Circuit Court of Appeals has not addressed the issue of whether emotional distress damages are recoverable in civil contempt proceedings and/or bankruptcy stay violation proceedings. However, at least two other circuit courts, several district courts, and several bankruptcy courts, have determined that emotional distress damages are not recoverable in such cases. *See McBride v. Coleman*, 955 F.2d 571, 577 (8th Cir. 1992); *In re Walters*, 868 F.2d 665, 670 (4th Cir. 1989); *U.S. v. Harchar*, 331 B.R. 720 (N.D. Ohio 2005); *Bauchman v. W. High Sch.*, 906 F. Supp. 1483, 1493, n. 6 (D. Utah 1995); *In re Urwin*, 2010 WL 148645, at *8 (Bankr. D. Idaho, Jan. 14, 2010); *In re Erickson*, 2008 WL 315173, at *5 (Bankr. D.N.D., Jan. 8, 2008).

In addition, the Seventh Circuit Court of Appeals has seriously questioned whether emotional distress damages are recoverable in a stay violation case. *See Aiello v. Providian Fin'l Corp.*, 239 F.3d 876, 880-881 (7th Cir. 2001); *see also Cousins v. CitiFinancial Mortg. Co (In re Cousins)*, 404 B.R. 281, 290 (Bankr. S.D. Ohio 2009) (noting that "there is some question as to whether emotional damages are compensable for stay violations).[1]

In *McBride*, the Eighth Circuit Court of Appeals correctly reasoned:

> **We do not believe civil contempt to be an appropriate vehicle for awarding damages for emotional distress…. The problems of proof, assessment, and appropriate compensation attendant to awarding damages for emotional distress are troublesome enough in the ordinary tort case, and should not be imported into civil contempt proceedings.** Although in some circumstances an award of damages to a party injured by the violation of an injunction may be appropriate… **the contempt power is not to be used as a comprehensive device for redressing private injuries, and it does not encompass redress for injuries of this sort.**

*McBride*, 955 F.2d at 577 (emphasis added) (citations omitted). The reasoning of *McBride* is particularly instructive here because Ms. Givens has already filed a separate tort case in the District Court seeking to recover emotional distress damages alleged to arise out of the same set of facts raised in her contempt motion. Specifically, in her District Court complaint, Ms. Givens alleges that Seterus has caused her "to suffer emotional distress given by fear, anxiety, and mistrust that her mortgage is being handled properly," and that Seterus has caused her "great emotional distress driven by the fear that she might lose her home which has resulted in loss of sleep, anxiety, depression, and embarrassment." Seterus' Trial Ex. C, ¶¶ 28, 42 and p. 12 (seeking at least $30,000.00 in "non-economic damages" and "punitive damages"). Ms. Givens also emphasized at trial that she wants a jury to hear these claims. Ex. 1, Hrg. Tr. pp. 172:15-173:11.

---

[1] Copies of all cited cases are included in the Appendix to this Brief.

Considering the foregoing unique circumstances, coupled with the unsettled question of law presented to this Court as to whether emotional distress damages are even recoverable in civil contempt proceedings, there is simply no need for this Court to award emotional distress damages to Ms. Givens. The District Court will have ample opportunity to address her emotional distress allegations in due course, including whether or not they are properly asserted, properly supported, and the proper compensation, if any, to be awarded for such damages. As in *McBrid*e, this Court need not use its contempt power "as a comprehensive device for redressing" all of Ms. Givens' "private injuries," especially when Ms. Givens is simultaneously pursuing redress for her private injuries in another forum. *McBride*, 955 F.2d at 577.

**2. Ms. Givens provided insufficient evidence of emotional distress damages.**

Even if the Court is not persuaded to follow the above-cited cases and instead determines that emotional distress damages are recoverable in a civil contempt proceeding, the Court should still decline to award such damages in this case. Courts have generally required that emotional distress damages, to be compensable, must be proven with a higher degree of certainty than ordinary economic damages, and in many cases must be proven with corroborating expert medical testimony:

> [B]ecause emotional distress damages are so easy to manufacture, courts have imposed a strict standard to be applied for them to be recoverable. *Sarver v. Experian Information Solutions*, 390 F.3d 969, 971 (7th Cir. 2004); *Aiello v. Providian Fin. Corp.*, 239 F.3d 876, 880 (7th Cir.2001); *Reed v. Experian Information Solutions*, 321 F.Supp.2d 1108, 1115 (D. Minn.2004). Accordingly, generalized claims of emotional injury are not enough to establish damages. *See Schmit v. Trans Union LLC,* 2004 WL 785098, * (N.D.Ill.2004) and *Lee Experian Information Solutions,* 2003 WL 22287351, *14-15 (N.D.Ill.2003).

*Garrett v. Trans Union LLC,* 2006 WL 2850499 at *11 (S.D. Ohio, Sep. 29, 2006). Rather, "there must be corroborative evidence of [emotional distress] damages, which is usually offered in the form of medical evidence." *Bankers Healthcare Group, Inc. v. Bilfield (In re Bilfield),* 494 B.R. 292, 304 (Bankr. N.D. Ohio 2013); *see also McCool v. Beneficial (In re McCool),* 446 B.R. 819, 824 (Bankr. N.D. Ohio 2010) ("strong corroborating evidence must be offered, usually in the form of medical evidence, to sustain an award of damages for emotional distress"); *In re Hedetneimi*, 297 B.R. 837, 842 (Bankr. M.D. Fla. 2003) ("a debtor must present some medical or other corroborating evidence showing that she suffered more than fleeting and inconsequential distress, embarrassment, humiliation, and annoyance."); *Meis-Nachtrab v. Griffen (In re Meis-Nachtrab),* 190 B.R. 302, 308 (Bankr. N.D. Ohio 1995) (debtor not entitled to damages for becoming "stressed out," "nervous" and "nauseous"); *Cousins v. CitiFinancial Mortg. Co (In re Cousins)*, 404 B.R. 281, 290 (Bankr. S.D. Ohio 2009) ("debtor requests for emotional damages have been flatly rejected when the alleged damages amount to nothing more than fleeting and inconsequential distress").

In the present case, Ms. Givens failed to present corroborating medical testimony, failed to introduce medical records into evidence, and wholly failed to support her emotional distress claims. Although she listed her family doctor as a trial witness, the doctor failed to appear at trial to testify. Ms. Givens also claimed to have a note or letter from her doctor which she also did not seek to introduce as an exhibit at trial. Thus, although Ms. Givens' contempt motion was pending for nearly a year, she failed to introduce at trial any corroborative evidence or testimony to support her claims for emotional distress damages.

Notwithstanding, the following evidence was adduced at trial:

1. Ms. Givens testified that her family doctor prescribed Wellbutrin[2] for her sometime in April 2016. Ex. 1, Hrg. Tr. p. 46:4-5. However, Ms. Givens did not receive any type of foreclosure notice whatsoever (verbal or written) from Seterus until June 2016. Ex. 1, Hrg. Tr. pp. 29:22-30:1, 31:19-33:25.

2. Prior to April 2016, when Ms. Givens was first prescribed Wellbutrin, the total sum of Ms. Givens' interactions with Seterus consisted of a phone call to Seterus to make a telephonic payment in January 2016, which was without incident (Seterus actually told Ms. Givens she had a credit showing on her account, not a deficiency), a phone call to Seterus to make a telephonic payment in February 2016 (again without incident), and a phone call from Seterus in March 2016, in which the Seterus representative told Ms. Givens she was two months behind on payments. Ex. 1, Hrg. Tr. pp. 24:24-25:7, 28:14-29:13. The only phone call that could be considered at all "stressful" was the single March 2016 call, but according to Ms. Givens, the only thing that happened on the call was: Ms. Givens told the representative that Seterus was supposed to have deemed the mortgage current, and the representative told her "she'd notate the account and I made my payment and that was that." Ex. 1, Hrg. Tr. p. 28:20-29:13. No evidence was offered of anything Seterus did (or failed to do) prior to April 2016 that would have caused Ms. Givens to suddenly require a prescription for a major depressive disorder.

[2] Wellbutrin "is an antidepressant medication used to treat major depressive disorder and seasonal affective disorder." https://www.drugs.com/wellbutrin.html. According to WebMD, Wellbutrin is used primarily to treat "major depressive disorder" but may also be used for the following conditions: "Binge Eating Disorder, Anxiousness associated with Depression, Depressed Mood Disorder Occurring Every Year at the Same Time, Bipolar Depression, Attention Deficit Disorder with Hyperactivity, Stop Smoking." http://www.webmd.com/drugs/2/drug-13509/wellbutrin-oral/details/list-conditions.

3. Ms. Givens also testified that she suffered from stress at least in part due to her mother being diagnosed with stage 4 colon cancer in late September or early October 2016. Ex. 1, Hrg. Tr. pp. 22:16-18, 45:1-6, 58:17-25. Ms. Givens' mother's diagnosis with cancer coincided with Ms. Givens asking her doctor to increase her dose of Wellbutrin, which her doctor declined to do. Ex. 1, Hrg. Tr. pp. 46:4-10, 59:1-6.

4. Ms. Givens testified that her doctor is a general internist, and that her doctor has never referred her to a psychiatrist or psychologist. Ex. 1, Hrg. Tr. p. 59:10-14.

5. Ms. Givens testified as to only two visits to her doctor since the Deemed Current Order was entered, and could not (or would not) testify as to how many other times she has seen her doctor since then, if any. Ex. 1, Hrg. Tr. pp. 57:14-58:7. No medical records were introduced regarding any visits.

6. The only medical expenses Ms. Givens testified to were $30 per visit co-pays, but she claimed not to be able to recall how many such co-pays she has paid since the Deemed Current Order was entered. Ex. 1, Hrg. Tr. pp. 57:19-58:7.

7. Ms. Givens testified that she has trouble sleeping but refused to be prescribed any type of sleep aid. Ex. 1, Hrg. Tr. p. 58:14-16.

Based on the foregoing evidence, even if the Court determines that emotional distress damages are generally recoverable in civil contempt proceedings, they should not be awarded in this case. There was no concrete evidence presented at trial that Seterus' actions (as opposed to other issues going on in Ms. Givens' life and/or a pre-existing depressive disorder that first began to be treated in April 2016) have caused Ms. Givens any compensable emotional distress. Moreover, there was a total lack of corroborating medical testimony, or even documentary evidence, presented in support of the emotional distress damages alleged. As in the cases cited above, an award of emotional distress damages is not sustainable here.

**C. Conclusion**

As to FNMA, Ms. Givens' contempt motion should be denied outright as Ms. Givens presented no evidence at trial that FNMA itself took any actions in violation of the discharge injunction. As to Seterus, based on the evidence at trial, and for all of the foregoing reasons, Seterus respectfully requests that the Court either deny Ms. Givens' contempt motion, or, if the motion is granted, that any damage award in favor of Ms. Givens be limited to attorney fees reasonably expended by her counsel on her behalf prior to July 28, 2016.

Respectfully submitted,

DICKINSON WRIGHT PLLC

/s/ David A. Lockshaw, Jr.
David A. Lockshaw, Jr. (0082403)
150 East Gay Street, Suite 2400
Columbus, Ohio 43215
Telephone (614) 744-2945
Facsimile (844) 670-6009
dlockshaw@dickinsonwright.com

Ari M. Charlip (0093185)
2600 W. Big Beaver Road, Suite 300
Troy, Michigan 48084
Telephone (248) 433-7267
acharlip@dickinsonwright.com

Doron Yitzchaki (Mich. Bar # P72044)
*Admitted Pro Hac Vice*
350 South Main Street, Suite 300
Ann Arbor, Michigan 48104
Telephone (734) 623-1947
dyitzchaki@dickinsonwright.com

*Counsel for Seterus, Inc. and*
*Federal National Mortgage Association*

Dated: October 18, 2017

## CERTIFICATE OF SERVICE

I hereby certify that on the 18th day of October, 2017, a true and accurate copy of the foregoing FEDERAL NATIONAL MORTGAGE ASSOCIATION AND SETERUS, INC.'S POST-TRIAL BRIEF was served on the following registered ECF participants, **electronically** through the Court's ECF System at the email address registered with the Court:

- The U.S. Trustee
- The Chapter 13 Trustee
- Debtor's Case Attorney, Michael B. Zieg of Nobile & Thompson Co., LPA

And on the same day to the following by **ordinary U.S. Mail** addressed to:

- Debtor, Lori Givens, 693 Glenmoor Dr., Columbus, Ohio 43228

/s/ David A. Lockshaw, Jr.
David A. Lockshaw, Jr. (0082403)

COLUMBUS 51516-195 77814v1